

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

LAURIE SMITH,

No. C 09-02903 WHA

Plaintiff,

v.

**ORDER REGARDING
RULE 35 DISCLOSURES**

AMERICAN AIRLINES, INC. and
DOES 1 to 50,

Defendants.

The undersigned has reviewed plaintiff's request to modify the recent order on the parties' discovery dispute. For the reasons set forth below, the request is **DENIED**.

Contrary to plaintiff's assertion, there does *not* have to be a Rule 35 motion and order to trigger the reciprocity obligations under Rule 35(b). Rule 35(b)(6) makes clear that the reciprocity obligations also apply to an examination performed pursuant to the parties' agreement (unless the agreement itself states otherwise). A Rule 35 motion and order is only needed when the party to be examined refuses to be examined by the opposing party, and judicial intervention is required. *See* FRCP 35(a). The reciprocity requirements under subsection (b) are different.

Whether a party moves for (and the court orders) a Rule 35 examination or the parties simply agree extrajudicially to such an examination, the examined party is *still* entitled to a copy of the examiner's report and copies of all earlier examinations of the same condition. Once the examining party, however, complies with its obligation to furnish these requested reports, it

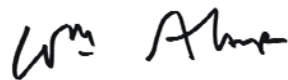
1 becomes entitled to receive from the examined party copies of reports of all previous and
2 subsequent examinations dealing with the same physical or mental condition. Additionally, by
3 requesting and obtaining the examiner's report (or by deposing the examiner), the examined party
4 waives any privilege it may have had (in that action or any other action involving the same
5 controversy) concerning testimony about all examinations of the same condition. *See* 7-35
6 Moore's Federal Practice - Civil § 35.12.

7 Given the above rules, it was the Court's understanding — based upon the discovery
8 letters submitted by the parties and representations made at the hearing — that such an
9 examination of plaintiff had occurred pursuant to an agreement between the parties. Indeed,
10 defendant noted in a letter filed on March 25, 2010, that a neurological examination had been
11 performed on plaintiff, that plaintiff requested a report of that examination, and that defendant
12 complied with plaintiff's request and produced the report. If these facts are true, defendant is
13 entitled under Rule 35(b) to receive from plaintiff copies of reports of all previous and subsequent
14 examinations dealing with the same physical or mental condition. *See* FRCP 35(b)(6). There
15 does not have to be a Rule 35 motion or order for these reciprocal disclosure obligations to
16 adhere.

17 As such, plaintiff's request to modify the prior order is **DENIED**. This denial is without
18 prejudice to plaintiff reasserting the objection if the factual representations made to the
19 undersigned were inaccurate or misleading.

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21 **IT IS SO ORDERED.**

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23 Dated: April 1, 2010.



WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE